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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1188

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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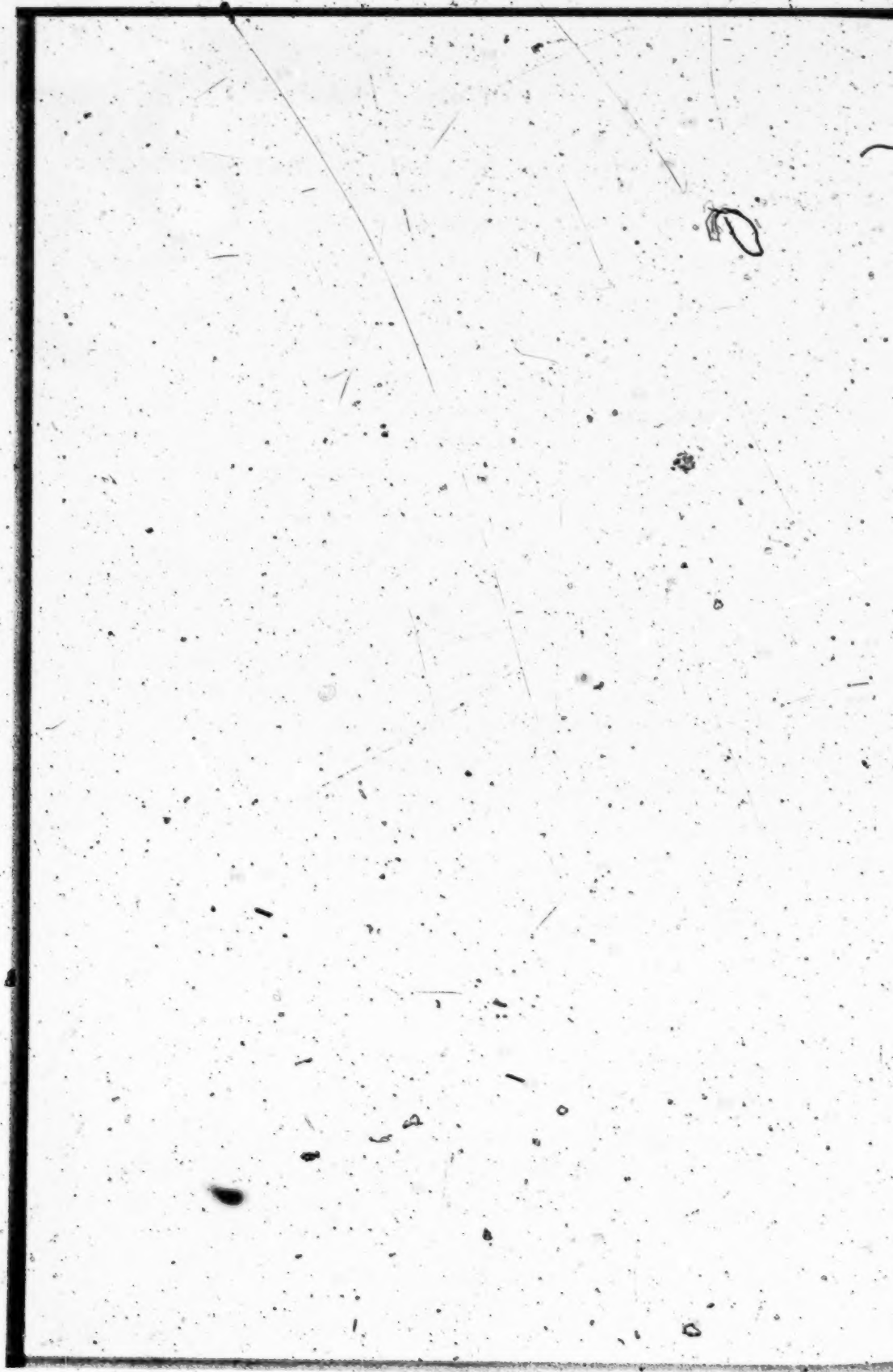

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioners pray that a writ of certiorari issue to review the orders of the Supreme Court of Appeals of Virginia entered on December 4, 1967 in two related cases.[1]

[1] Petitioners in the *Sullivan* case, in addition to Paul E. Sullivan, are Flora L. Sullivan, his wife, and their seven minor children, William F. Sullivan, Graciela P. Sullivan, Ana I. Sullivan, Maire Sullivan, M. Dolores Sullivan, M. Monica Sullivan, and Brigid Sullivan, who sued by and through Paul E. Sullivan, their father and next friend. Petitioners in the *Freeman* case, in addition to T. R. Freeman, Jr., are Laura Freeman, his wife, and their two minor children, Dale C. Freeman and Dwayne L. Freeman, who sued by and through T. R. Freeman, Jr., their father and next friend. Respondents in both cases, in addition to Little Hunting Park, Inc., are Mrs. Virginia Moore, Ronald L. Arnette, S. Leroy Lennon, Raymond R. Riesgo, Mrs. Marjorie Madsen, William J. Donohoe, Oskar W. Egger, and Milton W. Johnson, individuals who were directors of said corporation at times material herein.

OPINIONS BELOW

The memorandum orders of the Supreme Court of Appeals of Virginia (App. A and B, *infra*, pp. A-1-B-1) are not reported. The decision of the trial court in the *Sullivan* case was contained in a letter to the parties dated April 7, 1967 (App. C, *infra*, pp. C-1-C-3), and is reported at 12 Race Rel. L. Rep. 1008; the decree was entered April 12, 1967. The trial court's decision in the *Freeman* case was contained in a letter dated April 21, 1967 (App. D, *infra*, pp. D-1-D-3), which is not reported; the decree was entered May 8, 1967.

JURISDICTION

The orders of the Virginia Supreme Court of Appeals were entered on December 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

A Virginia corporation organized for the purpose of operating a community park and swimming pool permits a shareholder to assign his share to an eligible person—one who resides within a specified geographic area—subject to approval by the board of directors. A shareholder, upon renting his house, assigned his share to his tenant, but the board of directors refused to approve the assignment solely because the assignee was a Negro. When the shareholder protested the directors' discriminatory racial policy and sought to reverse their refusal to approve the assignment, the directors expelled him. The questions presented are:

1. Does it violate the Fourteenth Amendment to the Constitution of the United States for a corporation which operates a community park and swimming pool to refuse to permit a person who is otherwise eligible, to use its facilities solely on the basis of race?

2. Did the state court violate the Fourteenth Amendment by giving validity to the racial restriction on the use of the

community park and swimming pool operated by the corporation?

3. Were the free speech protections of the First and Fourteenth Amendments to the Constitution of the United States violated by the corporation's expelling a shareholder who dissented from its racial policies, and by the state court's sanctioning the expulsion?

CONSTITUTIONAL PROVISIONS

The provisions of the Constitution of the United States involved are the First Amendment and Section 1 of the Fourteenth Amendment. They are printed in Appendix E, *infra*, p. E-1.

STATEMENT

A. *Little Hunting Park, Inc.—its purpose and manner of operation.*

Little Hunting Park, Inc. was incorporated in 1954 under the Virginia Non-Stock Corporation Law[2] for the purpose, as set forth in its certificate of incorporation, of organizing and maintaining "a community park and playground facilities" for "community recreation purposes" (T. 184-185).[3] Pursuant to this object, the corporation owns land on which it has built and operates a swimming pool, tennis courts and other recreation facilities for the benefit of residents of the subdivisions known as Bucknell Manor, Beacon Manor, White Oaks, Bucknell Heights and certain adjacent neighborhoods in Fairfax County, Virginia (T. 186, 228). The corporation's by-laws provide that shares may be purchased by adult persons who "reside in, or who own, or who have owned housing units" in one of the specified subdivisions (T. 186).

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[2] Section 13-220, Code of Virginia, 1950 (1949 ed.).

[3] "T." refers to the transcript in the *Sullivan* case. "F.T." refers to the *Freeman* transcript.

A share entitles all persons and dependents in the immediate family of the shareholder to use the corporation's recreation facilities (T. 186-187).

The by-laws limit the numbers of shares in the corporation to 600 (T. 186). There is no limitation, however, on the number of shares that an individual may own, and it is not unusual for a person owning more than one house in the area served by Little Hunting Park pool to own a separate share for the use of the family occupying each house (T. 9, 189-190). Shares may also be purchased by institutions and corporations owning property in the neighborhood where the swimming pool is located. Thus, a share is currently owned by a church located in the neighborhood, and shares have been owned by two real estate companies that built and marketed the houses in Bucknell Manor and Beacon Manor, subdivisions served by Little Hunting Park. These two corporations have, at various times, owned at least 25 shares which they have retained for periods ranging from 5 to 7 years (F.T. 42-44).

The right to use Little Hunting Park's facilities may be acquired by purchase or by temporary assignment of a corporate share. The share may be purchased directly from the corporation, from any shareholder, or, upon buying a house in the community, from the vendor as part of the consideration for the purchase price of the house (T. 9, 187-189). A person residing within one of the subdivisions served by Little Hunting Park may obtain temporary assignment of a share. However, an assignment may only be made from landlord to tenant. (T. 187, 200)[4]

The corporation's by-laws have always provided that the issuance and assignment of shares are subject to the approval

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[4] Regardless of whether the swimming pool and park facilities are utilized by the shareholder or assignee, the owner of a share is obligated to pay an annual assessment in order to keep it valid. (T. 9-10, 199-200).

of the board of directors (T. 15, 192, 251-252). There were 1,183 shares issued and 322 shares assigned during the period from 1955 through 1966, the first 12 years of the corporation's existence (T. 192-193, 196-197). However, with the exception of the assignment to Freeman, there is no record of any assignment every being denied approval by the directors (T. 199). One applicant for the purchase of a share was disapproved during that period, but there is no evidence that this was other than because of the individual's failure to satisfy the geographic residence requirement of the by-laws (T. 198-199).

B. *The corporation's directors refuse to approve the assignment of Paul E. Sullivan's share because the assignee, Dr. T. R. Freeman, Jr. and his family, are Negroes.*

From about December 1950 to March 1962, Paul E. Sullivan and his family lived in a house which Sullivan owned and continues to own on Quander Road in the Bucknell Manor subdivision (T. 7). In May 1955, shortly after Little Hunting Park, Inc. was organized, Sullivan purchased a share, No. 290, for $150 (T. 7-8). In March 1962, Sullivan and his family moved a short distance to another house that Sullivan purchased located on Coventry Road in the White Oaks subdivision where, as part of the purchase price for the property, Sullivan acquired a second share from the seller of the house. Share No. 925 was thereafter issued to Sullivan by the corporation (T. 8-9, 66-67). After moving to Coventry Road, Sullivan continued paying the annual assessments on shares Nos. 290 and 925, and leased his house on Quander Road to various tenants. In consideration of the rent, he assigned share No. 290 as part of the leasehold interest (T. 9-10, 12, 14-16). Sullivan testified that the lease arrangement was a "package deal . . . the house, the yard and the pool share" (T. 10).

On February 1, 1965, Sullivan leased the Quander Road premises for a term of one year to Dr. T. R. Freeman, Jr.

at a rent of $1,548, payable in monthly installments of $129 (T. 10-11). The deed of lease described the property demised as "the dwelling located at 6810 Quander Road, Bucknell Manor, Alexandria, Virginia 22306, and Little Hunting Park, Inc. pool share No. 290" (T. 11). The lease was extended in identical terms as of February 1, 1966 and February 1, 1967 (T. 10-11). Dr. Freeman met all of the eligibility requirements for an assignee of a share in the corporation, since he is an adult, and the house that he leased from Sullivan is in Bucknell Manor subdivision (T. 204-205). Freeman has no other disqualifications: he is an agricultural economist with a Ph.D. degree from the University of Wisconsin, and at the time of the events herein was employed by the Foreign Agriculture Division of the United States Department of Agriculture (T. 176-177). He also holds the rank of Captain in the District of Columbia National Guard (T. 177). Dr. Freeman and his wife and children are members of the Negro race (T. 178).

In April 1965, Paul E. Sullivan paid the annual assessment of $37 on share No. 290 and, pursuant to his obligation contained in the lease on the Quander Road property, completed the form prescribed by the corporation affirming that Dr. Freeman was his tenant and therefore eligible to receive the assignment of that share (T. 11-12). Additionally, Dr. Freeman supplied certain information and signed the form, thereby doing everything required by the corporation to qualify as an assignee of the share (T. 12). However, the board of directors of the corporation, meeting on May 18, 1965, refused to approve the assignment of share No. 290 to Dr. Freeman, because he and the members of his family are Negroes (T. 13, 17-18, 164, 204-205, 239-240, 281). On May 25, 1965, Sullivan received a letter from S. L. Lennon, the corporation's membership chairman, notifying him that his assignment of share No. 290 to Dr. Freeman had been denied approval by the board of directors; no reason was given (T. 13).

C. *The corporation's directors expel Paul E. Sullivan because of his criticism of their refusal to approve the assignment of his share to Dr. T. R. Freeman, Jr. on the basis of race.*

Sullivan, upon learning of the directors' disapproval of his assignment to Dr. Freeman, sought further information concerning their action (T. 13-14, 16). In response to his inquiry, a delegation from the board—membership chairman S. L. Lennon, former president and director of the corporation, John R. Hanley, and director Oskar W. Egger—visited Mr. and Mrs. Sullivan at their home on May 28, 1965, and admitted that Dr. Freeman had been rejected solely because of his race (T. 16-18, 163-164, 250, 259, 278, 281). To Sullivan, this action was shocking, and as a matter of his religious teaching and conviction, immoral; he so informed the delegation. Furthermore, as a resident of the neighborhood for many years and as a member of Little Hunting Park, Inc. since its inception, he could not believe their assertion that the board's action reflected the unanimous view of the members of the corporation (T. 19, 22, 164). Nor could Sullivan in good conscience accept the board's offer to purchase share No. 290 which he had contracted to assign to Dr. Freeman (T. 18-19).

Following this meeting, Sullivan and Dr. Freeman, who was also his fellow parishioner, sought the advice of their priest, Father Walsh, who suggested that the board might reconsider its action if the directors had an opportunity to meet with Dr. Freeman and consider his case on its merits (T. 26). The suggestion that such a meeting be held was rebuffed, however, by Mrs. Moore, the corporation's president, when Sullivan spoke to her on June 9 (T. 28-29, 165). At about the same time, Sullivan spoke with several other shareholders, who, upon learning of the board's action, wrote letters to President Moore in which they expressed their strong disagreement with the board's action in disapproving Dr. Freeman (T. 217-223). After receipt of these letters, the board met on June 11, and decided that there appeared

to be "due cause" for Sullivan's expulsion from the corporation because of his "non-acceptance of the Board's decision" on the assignment of his share "along with the continued harassment of the board members, etc." (T. 29-31, 204, 220).[5]

Sullivan was told of the board's action in a letter from President Moore dated July 7, 1965, which also informed him that he would be given a "hearing" by the directors on July 20, 1965 (T. 29-31, 206). Because the directors refused to postpone the hearing in order that Sullivan's attorney could appear with him, and because they refused to provide Sullivan with a statement of the conduct alleged to constitute the basis for his expulsion, Sullivan was compelled to commence a civil action in the Circuit Court of Fairfax County (T. 52-53). Settlement of the action was reached upon the corporation's agreeing to postpone the hearing to August 17, 1965, and to furnish a detailed statement of the charges against him (T. 53). A statement specifying the alleged grounds for Sullivan's expulsion was thereafter furnished to him (T. 20-21).

At the "hearing" held by the directors on August 17, no evidence was introduced in support of any of the allegations against Sullivan, and he was not permitted to learn the identity of the persons making charges against him, nor to question them. He was also denied permission to have a reporter present to transcribe the proceeding. He had only the opportunity to present evidence concerning the charges as he understood them, and to state his views (T. 45-46, 53-55, 62-63, 129-130, 131, 286-287, 289). On August 24, 1965, the board met, and unanimously voted to expel Sullivan (T. 228). By letter of August 27, 1965, Sullivan was notified by President Moore of his expulsion, and he

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[5]The sole ground for expulsion provided under the corporate by-laws is for conduct "inimicable [sic] to the corporation's members." Article III, Section 6 (b). The board purported to act under this section in expelling Sullivan (T. 29-31, 206-207).

was tendered the then current "sale price" of his two shares, plus prorated annual assessments on the two shares, the total amounting to $399.34 (T. 55, 173-174).

D. *Relief sought*

Petitioners seek an order declaring invalid the racial restriction imposed by respondents on the use of the community park and swimming pool operated by Little Hunting Park, Inc. Petitioners in the *Sullivan* case also seek an order compelling full reinstatement of Paul E. Sullivan in Little Hunting Park, Inc. and reinstatement of shares Nos. 290 and 925. Finally, monetary damages are sought by petitioners in both proceedings; by the Freemans for respondents' interference with Dr. Freeman's contract with Paul E. Sullivan and for depriving Dr. Freeman and his family of the full use and enjoyment of the leasehold estate demised to him by Sullivan; and by the Sullivans for Paul Sullivan's wrongful expulsion from the association.[6]

E. *The proceedings below*

Petitioners raised the federal questions sought to be reviewed here by alleging in their complaints that, for the trial court to recognize as valid the racial restriction imposed by the corporation on use of its facilities, would be violative of the rights of petitioners "under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Federal Constitution . . ." Petitioner T. R. Freeman, Jr., in successfully opposing a demurrer in the lower court, argued further in a memorandum to the court (pp. 22-23) that, by its operation of a community recreation facility, Little Hunt-

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[6] In June 1967, Dr. Freeman and the members of his family left the United States, and they currently reside in Pakistan where Dr. Freeman is Assistant Agricultural Attache in the United States Embassy. Hence, injunctive relief, as sought in the court below to compel approval of the assignment of share No. 290 to Dr. Freeman, is no longer appropriate.

ing Park, Inc. exercises a public function which brings its activities within the purview of the Fourteenth Amendment. Petitioner Paul E. Sullivan contended at the trial that he had been expelled from the corporation for exercise of his constitutionally protected right of free speech (T. 244-245). Petitioners reasserted these positions in their petitions for appeal to the Virginia Supreme Court of Appeals and, in addition, Sullivan contended on the basis of *Curtis Publishing Co. v. Butts*, 388 U.S. 130, which had been decided in the interim between the trial and the filing of the appeal, that the directors of Little Hunting Park, Inc. were "public figures" in the community within the meaning of that case. Hence, it was asserted that the court could not under the First and Fourteenth Amendments apply state law to "sanction or recognize as valid the directors' action in expelling Sullivan from the association merely because he exercised his right to speak out critically concerning their discriminatory racial policy" (Pet. for Appeal, p. 34).

The trial court, in dismissing both complaints, held that the corporation is a "private social club" with authority to determine the qualifications of those using its facilities, including the right to deny such use on the basis of race. The court further held that the corporation's expulsion of Sullivan was permitted by the relevant provision of its by-laws and was justified by the evidence. The Virginia Supreme Court of Appeals rejected the petitions for appeal, thereby denying the appeals.

REASONS FOR GRANTING THE WRIT

The principal issue in this case is whether a private corporation performing a community or public function may conduct its affairs on a racially discriminatory basis. This same issue is now before the Court in *Jones v. Alfred H. Mayer Co.*, No. 645, October Term, 1967 (certiorari granted, December 4, 1967).[7] In *Jones* a real estate developer con-

[7]The *Jones* case also presents the question whether the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. Sec. 1982, prohibits discrimina-

structing a subdivision of approximately 100 projected homes—here a community recreation corporation serving nearly 600 shareholders and their families—pursued a policy of racial discrimination which served to deprive Negroes of community facilities which were available to white persons. In both cases, the corporations offered their facilities without regard to the personal characteristics of prospective purchasers, with the single common exception of race. In the instant case, of course, the immediate effect of the discrimination is to exclude Negroes from a park "the predominant character and purpose" of which is "municipal" in nature. *Evans v. Newton*, 382 U.S. 296, 302. However, the ultimate effect is more far-reaching than in *Evans*, for as in *Jones*, the discrimination results in significantly limiting the opportunities for Negroes to obtain one of the essential amenities of life—decent housing.

1. As the Court held in *Evans v. Newton*, the "service rendered even by a private park" can be of a public or municipal character requiring "that it be treated as a public institution subject to the command of the Fourteenth Amendment . . ." 296 U.S. at 301-302. The evidence in the instant case shows that Little Hunting Park, Inc. was organized and incorporated for the express purpose, as stated in its certificate of incorporation, of operating "a community park and

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tion in the sale or lease of property. Petitioners herein did not seek relief on the basis of that statute, because this Court had not ruled on the specific applicability of those provisions to private action. A decision by this Court upholding application of the 1866 Act to private action would be another reason, in addition to those set forth herein, for reversing the result reached by the Virginia court in the instant proceeding. The failure of petitioners to rely on the 1866 Act as a ground for relief does not preclude it as a basis for disposition of this case, for the "mere failure" to raise a constitutional question "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 142-143, and cases cited.

playground facilities" for "community recreation purposes" (T. 184-185). Pursuant to this object it operated its park and swimming pool for 11 years, making its facilities open to everyone who lived in the geographic area defined in the by-laws. Consistent with its stated purpose, the corporation never pursued a policy of exclusiveness. Even real estate developers and churches in the community were able to purchase shares. It was not until 1965, when this case arose, that there was a departure from the corporate purpose, when it became apparent that the park was open to everyone in the community, except Negroes.

The trial court's finding that Little Hunting Park, Inc. is a "private social club" is not dispositive of the issues in this case.[8] As this Court has made clear, there is no easy dichotomy between "private" and "public" organizations for the purpose of determining when the actions of an organization are subject to constitutional restraints. *Evans v. Newton*, *supra*, 382 U.S. at 299. As the Court pointed out in *Marsh v. Alabama*, 326 U.S. 501, 506:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his

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[8]Indeed, it is doubtful whether the ruling is correct under Virginia law, for the State's Non-Stock Corporation Act requires that the qualifications and rights of members be set forth in the articles of incorporation. Sec. 13.1-211, Code of Virginia, 1950 (1964 Replace. Vol.). See also, Sec. 13.1-231 (d). The corporate charter of Little Hunting Park, Inc., however, grants no power to the directors to create personal or racial qualifications for membership. Therefore, in the absence of any corporation provision derogating from the "community recreation" purposes of the corporation, the Virginia corporation law no more permits the directors to transform the corporation into a "private social club" by barring the use of its facilities to certain classes of residents of the community than it would permit them to divert corporate property to other than recreational purposes. See *Meyers v. Lux*, 76 S.D. 182, 75 N.W.2d 533, 536; *Morris v. Hussong Dyeing Machine Co.*, 81 N.J. Eq. 256, 86 Atl. 1026, 1028-1029.

> property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.

Accordingly, as the *Marsh* case illustrates, if facilities are built and operated primarily for public benefit and their operation is essentially a *public function*, they are subject to the limitations to which the State is subject and cannot be operated in disregard of the Constitution. *Ibid.*[9] We submit that Little Hunting Park, like Baconsfield Park which was the subject of *Evans v. Newton*, performs the *public function* of providing *mass recreation* for members of the community and, accordingly, as the Court there held, may not be operated on a racially discriminatory basis.[10]

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[9] Accord: *Terry v. Adams*, 345 U.S. 461; *Public Utilities Comm'n v. Pollack*, 343 U.S. 451; *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959, 968 (CA 4), cert. denied, 376 U.S. 938.

[10] In the *Evans* case the Court found it unnecessary to reach the question of whether Georgia, through a series of legislative enactments, had facilitated or encouraged the establishment of segregated parks. 382 U.S. at 300-301, n. 3. With regard to the instant case, it is to be noted that for many years, and continuing to this day, various aspects of the Virginia governmental and political system have been aimed at fostering and maintaining a racially segregated society in the State. An extensive scheme of constitutional and statutory provisions has been adopted over the years which inject racial discrimination into many aspects of public and private life. The "official command" to segregate contained in such enactments, when heard by private citizens such as the directors of Little Hunting Park, Inc., who are engaged in operating a community swimming pool, "has at least as much coercive effect as an ordinance." *Lombard v. Louisiana*, 373 U.S. 267, 273; and see, *Reitman v. Mulkey*, 387 U.S. 369, 380. The index to the Virginia Code contains three pages of references to constitutional and statutory provisions requiring segregation of the races. Although some of these enactments have been held by the courts to be unconstitutional, the validity of some provisions has never been challenged through litigation. So long as these many provisions of law remain on the books they presumably reflect the policy of the State to be heeded by its citizens. For discussion of the governmental policy of maintain-

2. The impact on the community of the racial policy at issue here is even greater than was the case in *Evans v. Newton*. For, rather than being a mere prohibition against the use of a public recreation facility by Negroes, the effect of Little Hunting Park's policy is to place in the hands of this private corporation the extraordinary power to control the racial composition of the community which it serves. The evidence demonstrates that municipally-owned public swimming pools are virtually non-existent in the Washington metropolitan area of Northern Virginia. As a consequence, the "public function" of providing "mass recreation" (*Evans v. Newton, supra*, 382 U.S. at 302) through community swimming pools has been assumed by privately organized recreation associations, such as Little Hunting Park, Inc.[11] Because of the "abdication" by local municipalities of the "traditional governmental function" (*Mulkey v. Reitman*, 50 Cal. Rptr. 881, 413 P.2d 825, 832, aff'd, 387 U.S. 369) of providing recreational facilities for local residents and the resulting importance of parks and swimming pools such as those operated by Little Hunting Park in fulfilling this community need, Negroes obviously will be discouraged from moving into a neighborhood where they are excluded from

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ing segregated park and recreational facilities in Virginia, see *Tate v. Department of Conservation and Development*, 133 F. Supp. 53, 55-57 (E.D. Va.), aff'd, 231 F.2d 615 (C.A. 4), cert. denied, 352 U.S. 838; *Wood v. Vaughan*, 209 F. Supp. 106, 111-113 (W.D. Va.), aff'd, 321 F.2d 474 (C.A. 4).

[11] In the Northern Virginia metropolitan suburbs (consisting of Arlington and Fairfax Counties, and the cities of Alexandria and Falls Church) with a population of approximately 690,000 people, there are only two municipally owned swimming pools and one municipally owned lake (T. 138-139). By contrast, in this same area there are nearly 50 community swimming pools of the same type as Little Hunting Park. Indicative of the role played by these pools in meeting the recreational needs of the Washington, D. C. suburban population, is the fact that in the suburbs of Maryland and Virginia there are a total of approximately 105 pools of this type. *The Washington Post*, p. A20, June 12, 1967.

such facilities. Conversely, a property owner owning a share in such a recreation association will be deterred from selling or renting his house to a Negro, since he will not have a ready purchaser or an assignee for his share.[12]

It is generally recognized that in recent years the availability of a community swimming pool and recreation facility is a major factor enhancing the desirability and value of residential property.[13] Examination of the real estate advertisements in any metropolitan newspaper reveals that particular emphasis is placed on the accessibility of a swimming pool in the neighborhood, and attests to the great importance that is attached to this feature in marketing homes.[14] Accordingly, since a house has greater market value if the purchaser or tenant has access to such a facility, when a Negro purchases or rents a house in a community where he is barred from the swimming pool association in which his vendor or landlord is a shareholder, there is an immediate loss in the value of the residence which must be borne by

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[12]Since Little Hunting Park, Inc. is not obligated to repurchase outstanding shares (T. 193), a shareholder stands the best chance of selling his share to the purchaser of his house. Similarly, since a share assignment can only be made from landlord to tenant and an annual assessment must be paid to keep a share valid, a landlord must rent his house to a white person in order to obtain reimbursement for his assessment or else suffer financial loss.

[13]Expert testimony to this effect was offered by petitioners in the court below (T. 133-136, 138, 146-147). Also see, Urban Land Institute, *Open Space Communities in the Market Place* (Tech. Bulletin 57, 1966) 7, 21, 41, 47-48 (Plaintiffs' Exh. 28).

[14]"[T]he community swimming pool is considered by most builders as one of their most popular sales appeals to people of all ages and incomes." 29 *Practical Builder* No. 2, p. 94 (Feb. 1964) (T. 148, Plaintiffs' Exh. 29). In one 12-page advertising supplement in *The (Washington) Evening Star* issue of January 20, 1967, there were over 50 advertisements for apartments and houses in which there was prominent mention of the pool facilities (T. 148-151, Plaintiffs' Exh. 30).

one of the parties to the transaction. Because of the close relationship between the association share and the value of the real estate, an owner in these circumstances will either refuse to sell or rent to non-Caucasians or else will require them to pay a higher price than the property is worth in the absence of the recreation facility. "Solely because of their race, non-Caucasians will be unable to purchase, own, and enjoy property on the same terms as Caucasians." *Barrows v. Jackson*, 346 U.S. 249, 254. And if this pattern is widespread, and as the record shows to be true for Northern Virginia, governments are unwilling to duplicate privately owned community recreation facilities with municipally operated facilities, non-Caucasians will not seek, or be able, to purchase or rent housing in whole sections of the State.

Undoubtedly, a significant factor underlying this Court's decision in *Barrows v. Jackson, supra*, and the closely related *Shelley v. Kraemer*, 334 U.S. 1, was recognition of the fact that the effect of a racially restrictive covenant is not localized, but rather that such a covenant is usually part of a system, the effect of which can be to blanket an entire community with uniform restrictions, thereby creating Negro and white ghettoes. The racially discriminatory policy of Little Hunting Park, we submit, no less than the discriminatory policies of those who enter into racial covenants, creates a system which is the equivalent of, and has the effect of a racial zoning ordinance. It is "as if the State had passed a statute instead of leaving this objective to be accomplished by a system of private contracts, enforced by the State." *Bell v. Maryland*, 378 U.S. 226, 329 (dissenting opinion of Justice Black), quoted in *Reitman v. Mulkey*, 387 U.S. 369, 385 (concurring opinion of Justice Douglas). Cf. *Buchanan v. Warley*, 245 U.S. 60.

It is further significant that the instant case, like *Shelley v. Kraemer*, involves an agreement voluntarily entered into by a white property owner and a Negro attempting to acquire

property, with attempted intervention by a third party seeking to prevent performance. *Shelley* and *Barrows* make clear that where, as here, "*both* parties are willing parties" to such a contract a state court may not give legitimacy to the effort to defeat the contract "on the grounds of the race or color of one of the parties." *Bell v. Maryland, supra,* 378 U.S. at 331 (dissenting opinion of Justice Black) (Emphasis in original.) The corporation in the instant case relied on the asserted right under its by-laws to condition Sullivan's assignment of his share on approval by the board of directors. This is no different, however, than *Shelley,* where the property owner likewise had no unlimited right to transfer his property; it too was subject to a racially restrictive covenant which was a "condition precedent" to the right of sale. The exercise, therefore, by the board of directors of its "right" to approve assignments and determine membership eligibility on the basis of race amounts to nothing less than the explicit racial covenant in *Shelley*. Thus, whether it is expressly denominated a racial covenant or a right of approval is of no moment;[15] it remains a racial restriction on the use or transfer of property to which the courts may not give "sanction" or "validity." *Barrows v. Jackson, supra,* 346 U.S. at 254, 258.

It is likewise immaterial that the party before the court who relies on the racial restriction asserts it as a basis for seeking affirmative relief, or, as here, rests on it as a defense. There is "no significant difference between the restrictive covenant being used as a basis for an action for either damages or an injunction by the proponent of such covenant and its assertion as a defense." *Spencer v. Flint Memorial Park*

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[15] See *Lauderbaugh v. Williams,* 409 Pa. 351, 186 A.2d 39; *Mountain Springs Ass'n v. Wilson,* 81 N.J. Super. 564, 196 A.2d 270, 275-277; *Tuckerton Beach Club v. Bender,* 91 N.J. Super. 167, 219 A.2d 529.

Ass'n, 4 Mich. App. 157, 144 N.W.2d 622, 626. Accord: *Clifton v. Puente*, 218 S.W.2d 272, 274 (Tex. Civ. App.). And see, *Rice v. Sioux City Memorial Cemetery*, 349 U.S. 70, 80 (dissenting opinion).

3. The directors' arbitrary action in expelling Sullivan from the corporation because of his voiced disagreement with its racial policy has resulted in depriving him and the members of his family of the use of the community recreation facility which it operates. Both of the shares that he owned have been revoked, thereby impairing the marketability for rental or sale of the two houses that he owns in the community served by Little Hunting Park, Inc.

If the directors' summary expulsion of Sullivan because of his dissent from their racial policy is allowed to stand, it will have the effect of granting them an immunity from criticism to which they are not constitutionally entitled. By assuming roles of leadership in Little Hunting Park, Inc., an organization devoted to developing and operating a community recreation facility, the directors necessarily became parties to any matters of public interest or public controversy in which the association might become involved. It is apparent that whatever way the directors had acted with respect to the Freeman assignment, their decision was likely to be a subject for comment and criticism by members of the association, as well as other persons with an interest in the affairs of the community. The directors were not entitled, however, to expel Sullivan because he opposed their discriminatory racial policy. Since, as we have already shown, the public function performed by Little Hunting Park, Inc. makes it subject to constitutional limitations, forfeiture of an individual's right of free speech may not be made a condition of the use of its facilities. *Marsh v. Alabama, supra,* 326 U.S. 501.[16]

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[16] Courts have frequently been guided by the First Amendment in protecting the right of dissent within voluntary associations. See, e.g., *Crossen v. Duffy*, 90 Ohio App. 252, 103 N.E.2d 769, 778; *Mitchell*

Particularly germane to the circumstances of this case is the concurring opinion of Chief Justice Warren (writing for a majority of the Court) in *Curtis Publishing Co. v. Butts, supra,* 388 U.S. at 163-164. As he observed, in the urbanized society that we know today:

> In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or by reason of their fame, shape events in areas of concern to society at large.
>
> Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society.

There can be little doubt that Little Hunting Park, Inc. plays the type of public role in the community that is described by the Chief Justice, and that the directors of the corporation are "public figures," as he used that term in the *Curtis Publishing* case. Further, as that case holds, it is violative of the First Amendment for the State to lend its judicial processes to vindicate the aggrievement asserted by a public figure against critics of his manner of participating in events of public interest. Applied to the instant case, this means that the Virginia Court could not sanction the

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v. International Ass'n of Machinists, 196 Cal. App. 2d 796, 16 Cal. Rptr. 813, 816-820; *Madden v. Atkins*, 4 N.Y.2d 283, 151 N.E.2d 73, 78; *Gallagher v. American Legion*, 154 Misc. 281, 277 N.Y.S. 81, 85, aff'd, 242 App. Div. 604, 271 N.Y.S. 1012; *Hurwitz v. Directors Guild of America*, 364 F.2d 67, 75-76 (C.A. 2), cert. denied, 385 U.S. 971.

directors' action in expelling Sullivan from the association merely because he refused to acquiesce in their discriminatory racial policy, but instead exercised his right to speak out critically concerning the matter. By holding that Sullivan's dissent from the association's policy constituted justification for his expulsion, the trial court invoked a standard of state law which had the effect of depriving Sullivan of rights protected by the First Amendment. This clearly is state action falling within the ambit of the Fourteenth Amendment. "The test is not the form in which state power has been applied, but whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265. Accord: *Curtis Publishing Co. v. Butts, supra*, 388 U.S. at 146-155.

In addition, to permit the state court to sanction Sullivan's expulsion from Little Hunting Park, Inc. for protesting Freeman's exclusion from the community park would be to allow the State to "punish" him for his failure to abide by the directors' determination that he must "discriminate against non-Caucasians in the use of [his] property. The result of that sanction by the State would be to encourage" the use and observance of such racial restrictions on property. *Barrows v. Jackson, supra*, 346 U.S. at 254. See also *Reitman v. Mulkey, supra*, 387 U.S. at 380-381.

4. The Supreme Court of Appeals of Virginia rejected the petitions for appeal presented to it in these two cases, thereby denying the appeals, on the stated ground that they were "not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it" as required by Rule 5:1, Sec. 3(f) of the Court.[17] In view of the substantial constitutional rights asserted by peti-

[17]Rule 5:1, Sec. 3(f) of the Virginia Supreme Court of Appeals provides that as part of the procedure for certifying a record for appeal the reporter's transcript must be tendered to the trial judge within 60 days and signed at the end by him within 70 days after

tioners here, we urge the Court to examine the record in these cases to determine whether the "procedural ground" on which the orders of the state court were based is "adequate to bar review by this Court." *Parrot v. City of Tallahassee*, 381 U.S. 129. For it is settled that, "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *N.A.A.C.P. v. Alabama*, 377 U.S. 288, 297; *Staub v. City of Baxley*, 355 U.S. 313, 318-320; *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 454-458.

The decree was entered in the trial court on April 12, 1967, in the *Sullivan* case, and on May 8, 1967, in the *Freeman* case. It is undisputed, as shown by the affidavits of counsel filed in the trial court, that on June 9, 1967, counsel for the petitioners, Mr. Brown, wrote Mr. Harris, counsel below for the respondents, informing him that the transcripts in the two cases would be tendered later that day to the trial judge. Mr. Brown also indicated that because of errors in the transcripts, he was filing motions to correct the transcripts. Mr. Brown stated in his letter that he would request the trial judge to defer signing both transcripts for a 10-day period, to allow time for Mr. Harris to consent to the motions or to have them otherwise acted upon by the court. The afternoon of June 9, when Mr. Brown sought to tender the transcripts to the judge, the latter was away from his office and not expected to return that day, so Mr. Brown left the transcripts as well as a copy of his letter to Mr. Harris with the judge's secretary; the judge later ruled that

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final judgment. The rule also states: "Counsel tendering the transcript . . . shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examing the original or a true copy of it." 2 Code of Virginia, 1950 (1957 Replace. Vol.) 602. The text of the provision is contained *infra*, p. E-1-E-2.

the tender of the transcripts was made on Monday, June 12, the day that he received them. Meanwhile, motions to correct the two transcripts were served on Mr. Harris, along with the notice that they would be brought to hearing before the court on Friday, June 16, the next Motion Day.

On Monday morning, June 12, the trial judge acknowledged to Mr. Brown over the telephone that he had received the transcripts and the motions to correct the record. Pursuant to Mr. Brown's request, he agreed to defer signing the transcripts until the motions had been acted upon. On Friday, June 16, the judge stated in court that the transcripts had been available in his office for one week, since the preceding Friday, for examination, but since it appeared that Mr. Harris had not examined them, the motions to correct the record would not be acted on until Mr. Harris indicated his agreement or disagreement with the changes requested. In order to facilitate Mr. Harris' examination of the transcripts, Mr. Brown lent him the petitioners' duplicate copies which Mr. Harris had in his possession from 1:20 p.m., June 16, until 6:30 p.m., June 19, at which time they were returned to Mr. Brown. Upon returning the transcripts, Mr. Harris stated that he had no objections to any of the corrections requested by the petitioners or to the entry of orders granting the motions to correct the transcripts. Mr. Harris then signed the proposed orders granting the motions which Mr. Brown had prepared. The proposed orders were submitted to the trial judge on June 20, who thereupon entered them, and after the necessary corrections were made, signed the transcripts on that date.

On the basis of the foregoing facts, and relevant decisions of the Virginia Supreme Court of Appeals, it is clear that petitioners have fully complied with Rule 5:1, Sec. 3(f). That court has emphasized repeatedly that the crucial requirement in the rule is not so much the matter of advance notice to opposing counsel before tender of the transcript to the trial judge, but rather the reasonableness of the opportunity afforded counsel to examine the transcript before

it is signed by the judge. See, *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321, 326; *Hyson v. Dodge*, 198 Va. 792, 96 S.E.2d 792, 798-799; *Kornegay v. City of Richmond*, 185 Va. 1013, 41 S.E.2d 45, 48-49. And what constitutes reasonable opportunity "must be determined by the facts of each case." *Cook v. Virginia Holsum Bakeries, Inc.*, 207 Va. 815, 153 S.E.2d 209, 210. The *Bacigalupo* case, in particular, involved circumstances indistinguishable from those presented here. After ruling that the prior notice to opposing counsel of tender had not met the requirement of reasonableness, the trial judge advised the parties that he would defer signing the transcript for seven days to afford counsel opportunity to examine the transcript and indicate his objections, if any. In holding that this procedure complied with Rule 5:1, Sec. 3(f), the Supreme Court of Appeals stated (102 S.E.2d at 326):

> The requirement that opposing counsel have a reasonable opportunity to examine the transcript sets out the purpose of reasonable notice. If, after receipt of notice, opposing counsel be afforded reasonable opportunity to examine the transcript, and to make objections thereto, if any he has, before it is signed by the trial judge, the object of reasonable notice will have been attained.

It is thus clear that even if insufficient advance notice was given to Mr. Harris of the tender of the transcripts to the judge, this deficiency was cured by the ample opportunity that Mr. Harris had after the tender to examine the transcripts and the motions to correct the transcripts, and to make any objections thereto. Further, Mr. Harris' signing of the proposed orders granting the motions to correct the transcripts reflect the fact that he had examined the transcripts and the proposed corrections, and concurred therewith. The Virginia Supreme Court of Appeals plainly has ignored its own decisions in reaching the result it did here, for it could have exercised its discretion to hear the appeals. That court's "discretionary decision" to deny the appeals "does not deprive this Court of jurisdiction to find that the substantive

issue[s]" are properly before it. *Williams v. Georgia*, 349 U.S. 375, 389; *Shuttlesworth v. City of Birmingham*, 376 U.S. 339.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Allison W. Brown, Jr.
Suite 501, 1424 16th Street, N. W.
Washington, D. C. 20036

Peter Ames Eveleth
217 Fifth Street, S. E.
Washington, D. C. 20003

Robert M. Alexander
1829 Columbia Pike
Arlington, Virginia 22204

Attorneys for Petitioners

Jack Greenberg
James M. Nabrit, III
10 Columbus Circle
New York, N. Y. 10019

Of Counsel

March, 1968.

APPENDIX A

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday *the* 4th *day of* December, 1967.

The petition of Paul E. Sullivan, Flora L. Sullivan, and William F. Sullivan, Graciela P. Sullivan, Ana I. Sullivan, Maire Sullivan, M. Dolores Sullivan, M. Monica Sullivan and Brigid Sullivan, infants, who sue by Paul E. Sullivan, their father and next friend, for an appeal from a decree entered by the Circuit Court of Fairfax County on the 12th day of April, 1967, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Little Hunting Park, Inc., and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it (Rule 5:1, § 3(f); *Snead v. Commonwealth*, 200 Va. 850, 108 S.E. 2d 399), doth reject said petition and refuse said appeal.

A Copy,

Teste:

Clerk

APPENDIX B

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday *the* 4th *day of* December, 1967.

The petition of T. R. Freeman, Jr., Laura Freeman, and Dale C. Freeman and Dwayne L. Freeman, infants, who sue by T. R. Freeman, Jr., their father and next friend, for an appeal from a decree entered by the Circuit Court of Fairfax County on the 8th day of May, 1967, in a certain chancery cause then therein depending, wherein the said petitioners were plaintiffs and Little Hunting Park, Inc., and others were defendants, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that the appeal was not perfected in the manner provided by law in that opposing counsel was not given reasonable written notice of the time and place of tendering the transcript and a reasonable opportunity to examine the original or a true copy of it (Rule 5:1 § 3(f); *Snead v. Commonwealth*; 200 Va. 850, 108 S.E. 2d 399), doth reject said petition and refuse said appeal.

A Copy,

Teste:

Clerk

APPENDIX C

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
April 7, 1967.

Mr. Robert M. Alexander,
1829 Columbia Pike,
Arlington, Virginia. 22204

Mr. John C. Harris,
1500 Belle View Boulevard,
Alexandria, Virginia.

Re: Sullivan v. Little Hunting Creek Park;
In Chancery No. 22751.

Gentlemen:

I find for the defendants in this case. It is my opinion that the expulsion of Mr. Sullivan should be upheld. The defendant Club may be a community recreation facility, but it is not a trade organization. It is private and social as is shown not only by its charter and By-Laws but also by its minutes, which regularly include a recital of "social activities." The requirement of approval of membership applications by the Board of Directors, even though the prospect might meet all other qualifications, would seem to be conclusive on this point. This being so, the Court's power to review the action of the Board of Directors is limited. I find no reason to set it aside. The Board acted within the powers conferred on it by the By-Laws, and there was ample evidence to justify its conclusion that the complainant's acts were *inimicable* to the Corporation's members and to the Corporation.

I do not believe property rights are involved in this case to any material extent. The number of memberships is in-

consequential when considered with the number of homes in the residential areas mentioned in the By-Laws. The further fact, there are such a large number of memberships available for sale with no buyers that the Directors considered the advisability of buying them in would appear to be a conclusive answer to this argument.

I do not find it necessary to pass on the defense that the stipulation of July 16, 1965, constituted a valid compromise and settlement and that under it the complainant is prevented from taking further action, although I am inclined to view that such is the case.

Mr. Harris can prepare a decree in accord with the foregoing and submit it to Mr. Alexander for his endorsement and exceptions.

Very truly yours,

James Keith.

JK:elc

Copy to:
Mr. Allison W. Brown, Jr.,
Suite 501, 1424 16th Street, N. W.,
Washington, D. C. 20036

† † †

C-3

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL E. SULLIVAN, et al.,

Plaintiffs,

v. IN CHANCERY NO. 22751

LITTLE HUNTING PARK, INC., et al.,

Defendants.

DECREE

This matter came on to be heard this 22d day of March, 1967, upon the bill of complaint, the answer of the defendants, upon the taking of evidence, upon argument of counsel, upon due consideration of the memoranda of law submitted by counsel, and the Court's specific finding that the defendant, LITTLE HUNTING PARK, INC., is a private and social club whose by-laws require approval of the Board of Directors for membership, and there was ample evidence to justify a finding that the complainant's acts were inimicable to the corporation's members and to the corporation and the Board of Directors of the defendant corporation acted within the powers conferred upon it by the by-laws of the corporation, it is therefore,

DECREED that the relief requested by the complainant be denied, to which ruling counsel for complainants except.

THIS DECREE IS FINAL.

ENTERED this 12th day of April, 1967.

James Keith
Judge

Entered in Chancery Order
Book No. 120, page 318

SEEN:

John Chas. Harris
Counsel for Defendants

SEEN AND EXCEPTED:

Robert M. Alexander
Allison W. Brown, Jr.
Peter Ames Eveleth

By Robert M. Alexander
Counsel for Complainants

APPENDIX D

SIXTEENTH JUDICIAL CIRCUIT OF VIRGINIA
PRINCE WILLIAM COUNTY FAIRFAX COUNTY ALEXANDRIA CITY

Fairfax County Courthouse,
Fairfax, Virginia, 22030,
April 21, 1967.

Mr. Robert M. Alexander,
1829 Columbia Pike,
Arlington, Virginia.

Mr. John C. Harris,
1500 Belle View Boulevard,
Alexandria, Virginia.

Re: Freeman v. Little Hunting Park, Inc.;
In Chancery No. 22752.

Gentlemen:

It is my opinion that the conclusion formerly reached in this matter that the defendant corporation is a private social club is controlling in this case. No constitutional right of the plaintiff has been violated. He does not come within the protection of the Civil Rights Act. The charter and by-laws of the corporation constitute a contract between the corporation and the members and between the members themselves. Under the by-laws, transfers and assignments are subject to the approval of the Board of Directors. All parties were aware of this fact. Section 13-105 of the 1950 Code of Virginia, relied on by the complainant, has been repealed. The refusal to approve the assignment to complainant appears to be consistent with the law and with the articles of incorporation. Therefore the relief prayed for will be denied.

Mr. Harris can prepare a decree in accordance with the foregoing and submit it to Mr. Alexander for his endorsement. I am sending a copy of this letter to Mr. Brown.

Very truly yours,

James Keith.

JK:elc

Copy to Mr. Allison W. Brown, Jr.

† † †

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

T. R. FREEMAN, JR., et al.,

Plaintiffs,

v. IN CHANCERY NO. 22752

LITTLE HUNTING PARK, INC., et al.,

Defendants.

DECREE

THIS cause came to be heard this 12th day of April, 1967 upon the bill of complaint, the answer of the defendants, upon the taking of evidence, upon argument by counsel, upon due consideration of the memoranda of law submitted by counsel, and the courts specific finding that the defendant, LITTLE HUNTING PARK, INC., is a private, social club whose by-laws require approval of the board of directors for transfers and assignments of membership; that no constitutional right of the complainants have been violated and they do not come within the protection of the Civil Rights Act, it, is, therefore,

ADJUDGED, ORDERED and DECREED that the relief requested by the complainants be denied, to which ruling counsel for complainants except.

THIS DECREE IS FINAL.

Entered this 8th day of May, 1967.

James Keith
Judge

SEEN:

John Chas. Harris
Counsel for Defendants

SEEN AND EXCEPTED:

Robert M. Alexander
Allison W. Brown, Jr.
Peter Ames Eveleth

By Robert M. Alexander
Counsel for Complainants

APPENDIX E

CONSTITUTION OF THE UNITED STATES

Amendments

Article I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Article XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

RULES OF THE SUPREME COURT OF APPEALS OF VIRGINIA

Rule 5:1. The Record on Appeal

Sec. 3. Contents of Record

* * *

(f) Such a transcript or statement not signed by counsel for all parties becomes part of the record when delivered to the clerk, if it is tendered to the judge within 60 days and signed at the end by him within 70 days after final judgment.

It shall be forthwith delivered to the clerk who shall certify on it the date he receives it. Counsel tendering the transcript or statement shall give opposing counsel reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it. The signature of the judge, without more, will be deemed to be his certification that counsel had the required notice and opportunity, and that the transcript or statement is authentic. He shall note on it the date it was tendered to him and the date it was signed by him.

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1188

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

JOHN CHAS. HARRIS
1500 Belle View Boulevard
Alexandria, Virginia 22307
Attorney for Respondents

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1188

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

BRIEF IN OPPOSITION TO PETITION

QUESTIONS PRESENTED

The Petitioners request a writ of certiorari to review the orders of the Supreme Court of Appeals of Virginia entered in the two captioned cases. The orders of the Virginia Court dismissed these appeals

on the basis that the appeals were not perfected in the manner provided by law in that the opposing counsel was not given reasonable written notice of the time and place of the tendering of the transcript and a reasonable opportunity to examine the original or true copy of it. (Rule 5:1 § 3 (f)). The question presented to the court therefore becomes whether the Supreme Court of Virginia, or any court, can set reasonable non-discriminatory rules of procedure for the orderly processing of appeals.

The action in the trial court was one for injunctive relief. Since Dr. Freeman and his family now reside in Pakistan, the relief requested is no longer appropriate (Petition page 9, note 6). The question now before this Court, is whether the expulsion from membership of Mr. Sullivan violated his right of free speech as guaranteed by the First and Fourteenth Amendments of the Constitution of the United States.

STATEMENT OF FACTS

The defendant corporation, LITTLE HUNTING PARK, INC., was organized as a private non-profit club. The purchase of a membership was required, dues were collected, a membership committee was established and the adopted by-laws required approval of application of membership by the Board of Directors. These same by-laws provided for the procedure to expel a member. The initial by-laws restricted membership to the adjacent community and, in effect, placed a geographical limitation on the residence of the membership.

Judgment was entered in Sullivan on April 12, 1967. Under Rule 5:1 § 3 (f) of the Supreme Court of Appeals of Virginia, the appellant must tender the transcript to the tried within 60 days after final judgment. Allowing for Sunday, June 11, 1967, the final day for tender of the transcript was June 12, 1967.

On June 9, 1967, Friday, counsel for petitioners mailed a letter to counsel for defendants that on that day he was tendering the transcript to the trial judge. The letter was received by counsel for defendants on Monday morning, June 12, 1967.

Rule 5:1 § 3 (f) further provides: "Counsel tendering the transcript or statement shall give reasonable written notice of the time and place of tendering it and a reasonable opportunity to examine the original or a true copy of it". In *OCEAN ACCIDENT CORP. v. HALEY* 158 Va 692, 164 SE 538, the Virginia Court in construing this wording stated "that the provision of the statute is mandatory, and that the notice was not reasonable within the plain meaning of its terms, which are jurisdictional".

The transcript was lengthy and contained many errors (Petition, page 21). The question of reasonable notice prior to the tendering is not applicable for the transcript was tendered before notice of its tendering was received.

On Friday, June 16, 1967, before the trial judge at 1:20 P.M. (Petition, page 22) the transcript was delivered to counsel for defendants. At the time the defendants' counsel raised the question of notice and the trial judge stated that the sufficiency notice was to be decided by the appellate court and he would merely note that he was tendered the transcript on June 12, 1967 at 9:00 A.M.

AUTHORITIES

The Supreme Court of Appeals of Virginia relied on *SNEAD v. COMMONWEALTH*, 200 Va 850, 108 SE 2d 399, in dismissing the appeal of the petitioners. In *SNEAD*, counsel for the defendant served notice on the Commonwealth Attorney at 7:00 P.M. on June 16, 1958 that on that same day he would tender the narrative

of the evidence. The tender was made at the residence of the trial judge at 7:30 P.M. that same evening. In dismissing the appeal the court held that the notice was not reasonable and stated "the plain language of the Rule requires counsel to give opposing counsel reasonable written notice of the time and place of tendering the transcript or narrative of the evidence and to give him a reasonable opportunity to examine and not the trial judge".

The petitioners cite *COOK v. VIRGINIA HOLSUM BAKERIES, INCORPORATED*, 207 Va 815, 153 SE 2d 209, in their petition as authority as to the facts of the case determining whether notice is reasonable. In *COOK*, counsel served notice on October 15, 1965 that a narrative of the evidence would be submitted to the trial judge on October 20, 1965. The narrative consisted of twelve pages and, under the circumstances, the notice was reasonable. This case is distinguished from the instant case in that the tender by the petitioners to the trial judge was made prior to the opposing counsel's receipt of the notice.

In *N.A.A.C.P. v. ALABAMA*, 357 U.S. 449, the Alabama court was inconsistent with their own prior holdings in refusing to grant an appeal and this court felt justified in reviewing the contempt conviction in the lower court. In the instant case, the Supreme Court of Appeals of Virginia was consistent with its prior holdings. See *SNEAD v. COMMONWEALTH*, supra, *COOK v. VIRGINIA HOLSUM BAKERIES, INCORPORATED*, supra, *HYSON v. DODGE*, 198 Va 792, 96 SE 2d 792, *VIRGINIA HOME FOR INCURABLES v. COLEMAN*, 164 Va 230, 178 SE 2d 908, *TYSON v. SCOTT*, 116 Va 243, 81 SE 77, *CLINCH VALLEY LUMBER CORP. v. HAGAN ESTATES*, 167 Va 1, 187 SE 440, *CEDAR WORKS v. HARPER*, 129 Va 481, 106 SE 516.

In *STAUB v. CITY OF BAXLEY*, 355 U.S. 313, Justice Frankfurter in his dissent stated:

> The relevance of a state procedure requiring that constitutional issues be presented in their narrowest possible scope is confirmed by the practice of this court. The court has long insisted, certainly in precept, on vigorous requirements that must be fulfilled before it will pass on constitutionality of legislation, on avoidance of such determination even by strained statutory construction, and on keeping constitutional adjudication, when unavoidable, as narrow as circumstances will permit.

In *STAUB*, this court found the ordinance in question repugnant to the constitution on its face and that a federal question did exist.

In the instant case, the expulsion of a member of a private club in accordance with its existing by-laws is not, on its face, repugnant to the Constitution of the United States.

The petitioners rely on the guarantee of free speech in the First and Fourteenth Amendments of the Constitution of the United States as the federal question to enable this court to grant a writ of certiorari to the Supreme Court of Appeals of Virginia when the jurisdictional procedures of that court have not been followed.

The First Amendment and the Fourteenth Amendment prohibit the Congress and any state from curtailing the right of free speech. The petitioners contend that since LITTLE HUNTING PARK, INC. performs a function that is also performed by the State, LITTLE HUNTING PARK, INC. becomes a "public figure" and within the purview of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN CHAS. HARRIS
1500 Belle View Boulevard
Alexandria, Virginia 22307
Attorney for Respondents

SUPREME COURT, U. S.

MAY 24 1968

JOHN F. DAVIS, CLERK

No. 1188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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The Court having specially requested Little Hunting Park, Inc. to submit a response to the petition for a writ of certiorari, petitioners respectfully request leave of the Court to file this reply to respondents' brief in opposition.

1. Respondents assert (Op. pp. 3, 4) that no prior notice was given to their counsel, Mr. Harris, before the transcripts were tendered to the trial judge, and upon this premise, attempt to distinguish the authorities cited by petitioners. This assertion, however, does not accord with the facts. As shown in the affidavit of Mr. Brown (*infra*, pp. 6, 9), he notified Mr. Harris by telephone on the morning of June 9, 1967, that he was submitting the reporter's transcripts to

the trial judge that afternoon. Mr. Brown further informed Mr. Harris that because of transcript errors, he was filing motions for correction of the record, noticing them for hearing on Friday, June 16, 1967, the court's next Motion Day. Finally, he told counsel that he would request the trial judge to defer signing the transcripts for the maximum period permitted under Rule 5:1, Sec. 3(f) (Pet. pp. E-1 - E-2) to allow for action on the motion.

In his letter to Mr. Harris of June 9, 1967 (*infra*, p. 10), Mr. Brown confirmed their earlier telephone conversation of that day, and reiterated that he would request the judge not to sign the transcripts until they had been corrected pursuant to the motions for corrections of the record. Although the transcripts were left with the judge's secretary on June 9, the judge ruled (as indicated by his notation at the end of the transcripts) that the tender was not perfected until he returned to his office three days later, on June 12. On June 12, Mr. Harris wrote Mr. Brown (*infra*, p. 11) in reference to their telephone conversation of the preceding Friday, and noted that because he did not have copies of the transcripts he could not consent to the requested corrections without reviewing the testimony. Significantly, Mr. Harris did not assert in his letter that he had not received prior notice of the tender of the transcripts to the judge, as indeed he could not, for obviously he had received notice.

2. The decisions of the Virginia Supreme Court of Appeals make clear that where opposing counsel has *actual* notice of the tender of the transcript to the trial judge and has sufficient opportunity to examine the record for accuracy before it is authenticated by the trial judge, the requirement of prior written notice is deemed waived, "particularly where its purpose has been otherwise accomplished." *Kornegay v. City of Richmond*, 185 Va. 1013, 41 S.E.2d 45, 49; *Grimes v. Crouch*, 175 Va. 126, 7 S.E.2d 115, 116-117; *Taylor v. Wood*, 201 Va. 615, 112 S.E.2d 907, 910. Not only did Mr. Harris' letter of June 9, in which he failed to raise any issue concerning the manner of notice under Rule

5:1; Sec. 3(f), constitute a waiver of the requirement of written notice, but as we have shown in the petition (p. 23), the rule was satisfied in any event when Mr. Harris was provided full opportunity to examine the transcript and make any objections, before it was signed by the judge. *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321, 326.[1] And see *Town of Falls Church v. Myers*, 187 Va. 110, 46 S.E.2d 31, 34; *Cook v. Virginia Holsum Bakeries, Inc.*, 207 Va. 815, 153 S.E.2d 209, 210; *Hyson v. Dodge*, 198 Va. 792, 96 S.E.2d 792, 798-799. Accordingly, it is apparent that the "appellees were not in any way prejudiced by the fact that an earlier notice was not given." *Stokely v. Owens*, 189 Va. 248, 52 S.E.2d 164, 167.[2]

3. In asserting that the Virginia Supreme Court of Appeals' disposition of this case was consistent with prior decisions of that court, respondents rely upon *Snead v. Commonwealth*, 200 Va. 850, 108 S.E.2d 399 (alternative holding). The facts present here, however, differ fundamentally from those in *Snead*, for in that case counsel gave notice at the residence of opposing counsel, after office hours, 30 minutes before tendering a narrative statement of the evidence to the trial judge. The narrative, characterized as "confusing", omitted the entire testimony of a very material witness which the trial judge, on his own initiative, was required to incorporate. Rejecting the contention that opposing counsel's opportunity to examine the narrative after tender was

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[1] As explained in *Bacigalupo*, under the present rule "the requirement of 'reasonable notice' of tendering [appearing in both the present and former rules] is [now] modified and qualified by the provision affording opposing counsel a reasonable opportunity to examine the original or a true copy of [the transcript].'"

[2] Since the decree of the trial court in the *Freeman* case was not entered until May 8, 1967, the 70-day period under Rule 5:1, Sec. 3(f) within which the trial judge was required to sign that transcript did not expire until July 17, 1967. Thus, Mr. Harris had over a month to examine the *Freeman* transcript after tender, had he concluded that further time was necessary.

sufficient compliance with the rule, the Court of Appeals observed that under the rule the duty to afford a reasonable opportunity to examine the transcript or narrative rests on counsel and not the trial judge. 108 S.E.2d at 402.

In contrast, here opposing counsel not only had three days' advance notice of tender of the transcripts, but was informed by petitioners' counsel that he would request the trial judge to defer the signing for the maximum period permitted by the rules to enable counsel to examine the proposed corrections to the transcripts and to suggest changes. Thus, in accordance with the rule, petitioners' counsel assumed full responsibility for assuring that opposing counsel had reasonable opportunity to examine the transcripts. In these circumstances, we submit, the Supreme Court of Appeals' ruling that Rule 5:1, Sec. 3(f) was not satisfied, in view of its consistent line of decisions to the contrary, is inexplicable.[3] As this Court stated in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458, such [n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." To conclude that the state court's

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[3] See *Cook v. Virginia Holsum Bakeries, Inc., supra.* (Although notice of tender was given October 15 of tender on October 20, copy of proposed narrative was not supplied until October 19. Since opposing counsel was able to examine statement and make corrections, notice was held sufficient; *Bacigalupo, supra*, cited, and *Snead, supra*, held distinguishable.)

interpretation of its rule here is a non-federal ground adequate to support the judgment would "force resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320.

Respectfully submitted,

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Of Counsel

May 1968.

APPENDIX

VIRGINIA—

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL E. SULLIVAN, et al., Plaintiffs,	)	
v.	)	In Chancery No. 22751
LITTLE HUNTING PARK, INC., et al., Defendants.	)	

AFFIDAVIT

I, Allison W. Brown, Jr., attorney for the plaintiffs in the above matter, being duly sworn, do state:

That on Friday morning, June 9, 1967, I called John Charles Harris, Esquire, attorney for the defendants, on the telephone and informed him that I was submitting the reporter's transcript in this case to Judge James Keith that afternoon. I further informed Mr. Harris that the transcript contained numerous errors, and therefore that the attorneys for the plaintiffs were filing a Motion for Correction of the Record, noticing it for hearing on the Court's next motion day, which would be Friday, June 16, 1967. I also stated to Mr. Harris that I would notify Judge Keith that plaintiffs' attorneys were filing such a motion and that I would request that Judge Keith defer signing the transcript until the end of the period permitted by the Court's Rules, in order to allow time for action on the motion.

That after talking to Mr. Harris, I wrote him a letter which I deposited postage prepaid in a mail box in Alexandria, Virginia on Friday afternoon, June 9, 1967. In said letter to Mr. Harris, I confirmed our telephone conversation, stating that I was submitting the reporter's transcript to Judge Keith that day, and indicating again that plaintiffs were fil-

ing a Motion for Correction of the Record, and further, that I would request Judge Keith to defer signing the transcript to allow time for Mr. Harris to consent to the motion or so that it could be otherwise acted upon by the Court.

That at approximately 3:45 P.M. on June 9, 1967, I took the reporter's transcript in this case, as well as a copy of my aforesaid letter to Mr. Harris, to Judge Keith's office in the Fairfax County Court House. I was informed by the Judge's secretary that Judge Keith was conducting a trial in Alexandria and that she did not expect him back in the office that afternoon. I then gave the aforesaid transcript and letter to the secretary, who took them into Judge Keith's office and I observed her place them on the Judge's desk.

That on Sunday, June 11, 1967, Robert M. Alexander, one of the attorneys for the plaintiffs, served on John Charles Harris, Esquire, a copy of the plaintiffs' Motion for Correction of the Record, by depositing it postage prepaid in the United States Mail. With said motion was served a notice that it would be brought to hearing before the Court on Friday, June 16, 1967. Said notice and motion were also mailed on June 11, 1967, to the Clerk of the Court, with a copy of each to Judge Keith.

That the aforesaid motion was placed on the Court's calendar for Friday, June 16, 1967 and was heard that day by Judge Keith.

That Judge Keith stated in open court on June 16, 1967, that the reporter's transcript in this case had been available for examination in his office ever since it had been left there a week earlier, but since it appeared that Mr. Harris had not availed himself of the opportunity to examine it, Judge Keith stated that he would not act on the Motion for Correction of the Record until Mr. Harris indicated his agreement or disagreement with the changes requested.

That I consented in open court that, in order to facilitate Mr. Harris' examination of the reporter's transcript, I would make available to him on a loan basis the plaintiffs' duplicate copy of said transcript.

That I gave said copy of the transcript to Mr. Harris at 1:20 P.M. on Friday, June 16, 1967, and he retained it until 6:30 P.M., Monday June 19, 1967, at which time he returned it to me.

That at the time Mr. Harris returned the plaintiffs' copy of the transcript, he informed me that he had no objections to any of the corrections of the record requested by the plaintiffs, and that he had no further corrections to request on behalf of the defendants. Mr. Harris stated that he therefore had no objection to entry of an order correcting the record to the respects specified in the motion. Mr. Harris thereupon signed a proposed order which had been prepared by me for submission to Judge Keith granting the plaintiffs' Motion for Correction of the Record.

That the proposed order granting the Motion for Correction of the Record was submitted by the plaintiffs to Judge Keith on Tuesday afternoon, June 20, 1967.

Allison W. Brown, Jr.

[Jurat.]

[Certificate of Service dated the 6th day of July, 1967.]

AFFIDAVIT

[Caption omitted]

I, Allison W. Brown, Jr., attorney for the plaintiffs in the above matter, wishing to supplement and add to my affidavit previously given herein, and being duly sworn, do state:

That on Monday, June 12, 1967, at approximately 9:30 A.M. I called Judge James Keith on the telephone at his office, and he acknowledged having received the reporter's transcript, the copy of my letter to Mr. Harris dated June 9, 1967, and a copy of the plaintiffs' Motion for Correction of the Record. I asked Judge Keith at that time to defer signing the transcript until the Motion for Correction of the Record had been acted upon, and he indicated that he would do so.

Allison W. Brown, Jr.

[Jurat.]

[Certificate of Service dated the 8th day of July, 1967.]

Suite 501, 1424 - 16th Street, N. W.
Washington, D. C. 20036
June 9, 1967

John Charles Harris, Esquire
1500 Belleview Boulevard
Alexandria, Virginia

Re: *Sullivan v. Little Hunting Park, Inc.* In Chancery No. 22751
Freeman v. Little Hunting Park, Inc. In Chancery No. 22752

Dear Mr. Harris:

This will confirm our telephone conversation of today in which I notified you that plaintiffs are submitting the reporter's transcripts in the above cases to Judge Keith today.

As I indicated, the transcripts contain innumerable errors, and it has been a major task to draft necessary corrections to make them intelligible. We will serve you on or about June 12 with motions to correct the two transcripts, and will ask Judge Keith to defer signing the transcripts until the end of the 10-day period permitted by the Rules. This will allow time for you to consent to the motions or to have them otherwise acted upon by the Court.

Very truly yours,

Allison W. Brown, Jr.
Attorney at Law

cc: Judge James Keith
Circuit Court of Fairfax County
Fairfax, Virginia

LAW OFFICES
HARRIS AND ROARK
1500 BELLE VIEW BOULEVARD
ALEXANDRIA, VIRGINIA

June 12, 1967

Allison W. Brown, Jr., Esquire
1424-16th Street, N.W., Ste. 501
Washington, D.C.

Re: Sullivan v. Little Hunting Park, Chancery No. 22751
Freeman v. Little Hunting Park, Chancery No. 22752

Dear Mr. Brown,

I have received your motion for the correction of the record in the above cases. It appears that your motions request 220 corrections in the record of the Sullivan case and 43 corrections in the Freeman case.

As I informed you on the telephone on Friday, June 9, 1967, I do not have a copy of the transcript and therefore, cannot consent to these changes without adequate review of the testimony.

Sincerely,

/s/ J. Harris
John Chas. Harris

JCH:caw

cc: Judge James Keith
Circuit Court of Fairfax County

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SULLIVAN ET AL. *v.* LITTLE HUNTING PARK, INC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1188. Decided June 17, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the Supreme Court of Appeals of Virginia for further consideration in light of *Jones* v. *Alfred H. Mayer Co.*, — U. S. —, No. 645, decided this date.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE HARLAN's dissenting opinion in *Jones* v. *James H. Mayer Co.*, — U. S. —, —, No. 645, decided this date.